IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

Filed May 20, 1899.

Supreme Court, U. S.
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JAMES H. MCKENNEY,
Clerk.

WILLIS THORP,
Plaintiff in Error,
vs.
S. W. BONNIFIELD AND JOHN G. HEID,
Defendants in Error.

No. 455

Brief of Plaintiff in Error Against Motion of Defendants in Error to Dismiss Appeal.

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The learned counsel for defendants in error have unintentionally erred in their recitation of facts, set forth in their motion to dismiss.

Counsel state that "the cause was tried in the United States District Court for the District of Alaska, by stipulation of the parties, without a jury."

There was no stipulation of parties that the cause should be tried without a jury; neither was there a trial of the cause either with or without a jury. The fact that there was no trial is the very thing complained of by plaintiff in error.

The defendants in error commenced an action at law in the District Court of the United States for the District of Alaska, on the 15th day of April, 1895, against the plaintiff in error, to recover certain moneys alleged to be due under the terms of a certain indenture of lease of certain mining properties situated in the District of Alaska.

A demurrer to the complaint was overruled, and judgment by default was entered against the plaintiff in error in February, 1897.

The plaintiff in error moved to vacate and set aside the default judgment, which motion was denied, whereupon he sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, holding terms at San Francisco, and defendants in error filed a motion in said Circuit Court of Appeals to dismiss the writ of error on the ground and for the reason that the Circuit Court of Appeals had no jurisdiction to review decisions of the District Court of the United States, for the District of Alaska, in cases of this character.

On the 21st of October, 1896, the Circuit Court of Appeals arrested the determination of this cause upon its merits and certified it to this Court for the purpose of receiving the instructions of this Court for its proper decision upon the question of jurisdiction of said Circuit Court of Appeals to hear and determine this cause upon its merits. This Court answered the question in the negative, and its mandate was spread upon the records of said Circuit Court of Appeals on the 3rd of January, 1898.

On or about July 8, 1898, Congress passed an Act, entitled: "An Act providing for the transfer from the Circuit Court of Appeals for the Ninth Circuit, to the Supreme Court, of certain appeals from the District Court of Alaska." Whereupon the record of this case was transmitted by the Clerk of the Circuit Court of Appeals at San Francisco, to this Court.

In addition to the portion of the record printed and set forth in the brief of the learned counsel for the defendants in error on this motion, such other portions of the record as is deemed by plaintiff in error to be necessary upon the decision of this ~~Court~~ motion is printed and set forth in this brief. Ex. A. Post.

ARGUMENT.

The able counsel for the defendants in error base their motion to dismiss upon two grounds:

I.

That this Court has no jurisdiction to consider this case because the same was brought here by writ of error instead of by appeal.

II.

The invalidity or unconstitutionality of the Act of July 8th, 1898, aforesaid.

We will discuss these in their order.

I.

Want of jurisdiction of this Court to consider this case because the same was brought here on *writ of error* instead of by *appeal.*

This we oppose on three grounds:

1st. Defendants in error are estopped from urging this ground at this time as the same is not one of the grounds urged by defendants in error upon their motion to dismiss in the Circuit Court of Appeals.

The only ground therein urged being, not that the case was brought up on writ of error, but, that an appeal would not lie from the said Alaska Court to the said Circuit Court of Appeals.

2nd. Assuming the Act of April 7, 1874 (18 St. at L., 27) to be applicable to appeals from the District Court of Alaska, it is not applicable to the facts in this case,

for the reason that this was not a trial by the Court without a jury. In fact it was not a *trial* at all. The case cited by the learned counsel for defendants in error, viz., *Gregory Consol. Mining Co vs. Starr,* was a case *tried* by the Territorial Court of Montana without a jury.

We take it that the act has regard to an action at common law, in which the Court has heard and determined the case upon the facts by stipulation of the parties, without a jury, or has decided the same upon an issue of law. Such is not the status of this case.

3rd. But we contend that the Act of April 7th, 1874, does not cover or have application to appeals from the Court in Alaska for the following reasons:

The Act, or so much thereof as is deemed applicable, reads as follows:

> "Whereas, by the organic acts establishing several of the Territories of the United States, it is provided that certain courts thereof shall have common-law and chancery jurisdiction, and doubts have been entertained whether said jurisdictions must be exercised separately, or whether they may be exercised together in the same proceeding, and whether the codes and rules of practice adopted in said Territories which have authorized a mingling of said jurisdictions in the same proceeding, or a uniform course of proceeding in all cases legal and equitable, are repugnant to the said organic acts respectively: Therefore,
>
> *Be it enacted, etc.,* That it shall not be necessary in any of the courts of the several Territories of the United States to exercise separately the com-

mon-law and chancery jurisdictions vested in said Courts; and that the several codes and rules of practice adopted in said Territories respectively, in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases whether legal or equitable, be confirmed; and that all proceedings heretofore had or taken in said courts in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be, and the same are hereby validated and confirmed:

Provided, That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.

Sec. 2. That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe."

Now Alaska has never been considered one of the organized territories of the United States.

Let us examine the various Acts of Congress relating to Territories.

By Act of September 9, 1850 (9th St. at L., 447), a certain circumscribed region is "erected" into a temporary government by the name of New Mexico.

By Act of same date (9th St. at L., p. 453) a certain circumscribed region is "erected" into a temporary government by the name of Utah.

By Act of March 2, 1853 (10th St. at L., p. 172), a certain circumscribed region is "organized" into a temporary government by the name of the Territory of Washington.

By Act of February 28, 1861 (12th St. at L., 172), a certain circumscribed region "is erected" into a temporary government by the name of the Territory of Colorado.

By Act of March 2, 1861 (12th St. at L., 239), a certain circumscribed region "is organized" into a temporary government by the name of the Territory of Dakota.

By Act of February 24, 1863 (12th St. at L., p. 664), a certain circumscribed region "is erected" into a temporary government by the name of the Territory of Arizona.

By Act of March 3, 1863, (12th St. at L., p. 808), a certain circumscribed region "is created" into a temporary government by the name of the Territory of Idaho.

By Act of May 26, 1864 (13th St. at L., p. 85), a certain circumscribed region "is created" into a temporary government by the name of the Territory of Montana.

By Act of July 25, 1868 (15th St. at L., p. 178), a certain circumscribed region "is organized" into a tem-

porary government by the name of the Territory of Wyoming.

Thus stood the Acts organizing the territories, and the organized territories up to a date as late as July 25, 1868, and subsequent to the acquisition of Alaska.

In every one of these Acts Congress either *erected, created* or *organized* a certain region into a temporary government under a certain name. In every one of these territories certain territorial courts were created. A territorial government was provided, and the territoria l legislatures were invested "with power over all rightful subjects of legislation, etc."

From every one of the territorial Supreme Courts thus created *writs of error,* and *appeals* were allowed to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United Ctates.

Now, this means that in common-law actions the case was removable to the Supreme Court on *writ of error,* while in equitable proceedings, by *appeals.*

This was the law relating to territorial courts and proceedings, and these were the organized Territories up to July 25, 1868. Two days later, July 27, 1868 (15th St. at. L., 240), an Act of Congress was passed whereby the laws of the United States relating to customs were extended to all "The territory ceded to the United States by the Emperor of Russia."

Now Congress at that time did not consider this vast domain as a Territory in the sense in which it considered or regarded the Territories above mentioned. It was more in the nature of an outlying province or a district. It created no territorial form of government. No court was provided for it, but on the contrary it declared that "until otherwise provided by law, all violations of the customs regulations, and of all of the laws by said Act extended to Alaska, and committed within Alaska, shall be prosecuted in any District Court of the United States in California, or Oregon, or in the District Courts of the Territory of Washington."

Thus stood the law up to the date of the compilation of the Revised Statutes of the United States, wherein Title XXII, Chap. 2, is titled: "Provisions concerning particular organized territories." Under this Chapter are provisions relating to the organized Territories above mentioned.

The next Chapter, viz., Chap. 3, is titled: "Provisions concerning the unorganized territory of Alaska," and contains provisions relating solely to said unorganized territory, thus evincing the intention, interpretation and understanding of Congress at that date of a distinction between Territories, so called, and the tract or province or territory ceded to the United States by Russia. Now, the distinction between Territories proper and this ceded area standing thus at the date of this Act of April 7, 1874, let us analyze said act and ascertain whether

it was intended to be an Act applicable specially to the organized Territories as they then existed, or whether it was to be construed as covering then or at any future time any other Territory thereafter to be organized, or especially Alaska.

The first line of the preamble recites, that "Whereas, by the organic acts establishing *several* of the Territories of the United States.' This certainly must refer to the several Territories theretofore established, and not to the unorganized Territories not yet established.

Continuing, the preamble recites: "It is provided that certain courts thereof shall have common-law and chancery jurisdiction."

Now this language refers only to the Territories so organized, as in no other Territory was a Court organized.

Again, continuing, said preamble recites: "Doubts have been entertained * * * whether the codes and rules of practice adopted in said Territories * * * are repugnant to said organic acts respectively," showing plainly that it was applicable only to the Territories then organized by *"said organic acts,"* neither of which acts included then, or thereafter, Alaska, which, as yet, has never been the subject of an *"organic act."*

Then section 1 provides, "That it shall not be necessary in any of the Courts of the several Territories of the United States to exercise separately the common-law and

chancery jurisdictions vested in *said* Courts; and that the several codes and rules of practice adopted in *said* Territories respectively, etc., etc.," showing conclusively that the Act was especially applicable to the Territories then organized, which were referred to as *said* Territories with *said* Courts.

Now Sec. 2, being the section on which the learned counsel rely, reads: "That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, etc., etc."

Now by the use of the words *'said Territorial Courts,'* Congress referred to and meant the Territories above mentioned as organized at that time, and having Territorial Courts, and did not refer to the unorganized Territory ceded to the United States by the Emperor of Russia.

We apprehend counsel will concede that at the date of the Act it had no reference to the unorganized Territory of Alaska, but will contend that it covers and is applicable to appeals from said Alaska Court upon the creation of a court in Alaska.

Various acts have been passed by Congress relating specifically to Alaska, but the first attempt at providing any semblance of civil government for Alaska is by Act of May 17, 1884 (23 St. at L., 24). Now, a close examination of this statute reveals that Congress has

neither *erected, created* or *organized* any circumscribed region here into a temporary government under any particular name, as was the practice in the case of the Territories heretofore referred to; but recognizing that there existed a vast area or province known as Alaska, which was becoming more or less populous and requiring some legal restraint or regulations, provided, in the first section "That the Territory ceded to the United States by Russia by the treaty of March 30, 1867, and known as Alaska, shall constitute a *civil* and *judicial District,*" (italics our own) and further provides that it shall be governed as in that Act provided. Mark the language. No Territory is *created, erected* or *organized*, but that vast unexplored, unestablished region shall constitute a "*civil* and *judicial* district," which shall be governed, not like an organized Territory, but, solely by Congress as in the Act provided. (not by act of 1874)

Sec. 2. "A governor shall be appointed who shall be charged with the interest of the United States Government that may arise within said District," manifesting plainly the intention of Congress that the only interest in said District would be the interest of the United States; very unlike a Territorial government.

The governor shall see that laws enacted for the District by Congress are enforced and also that officials appointed to administer the laws are faithful to their trust. No officers are appointed except by the United States Government, and there are no laws to enforce except the laws of Congress.

The President has the power to annul reprieves, or any other act of the Governor.

Section 3 of the Act establishes a "District Court for said District with the civil and criminal jurisdiction of District Courts of the United States, and District Courts of the United States exercising the jurisdiction of Circuit Courts."

Now the Court established in this unestablished Territory is a District Court for the District. It is not a Territorial Court. It could not properly be a Territorial Court, until a territory is established. The jurisdiction of the Court may be altered by Congress at any time.

By Section 4, the Clerk of the Court is *ex officio* Secretary and Treasurer of the District, and all moneys shall be accounted for to the Secretary of the Treasury of the United States. This system is absolutely the opposite of a Territorial Government. There is no county organization whatever.

Section 7 enacted that the general laws of Oregon in force at that time shall be the law in said District, so far as the same were applicable, etc., and it was further provided that *writs of error* in criminal cases should issue to the said District Court from the United States Circuit Court for the District of Oregon, but the final judgments or decrees of said Circuit Court for Oregon or of said District Court for the District of Alaska "may be

reviewed by the Supreme Court of the United States as in other cases."

Now this puts the Circuit Court of Oregon and the District Court for the District of Alaska on the same plane or basis, so far as the removal of cases therefrom to the Supreme Court is concerned; they are removable to the Supreme Court *"as in other cases," i. e.,* a *writ of error* or *appeal* is had from the Alaska Court in case where the *writ* or *appeal* would lie from the Circuit Court.

It will not be contended that an action at law could be transferred from the Circuit Court or any iDstrict Court of the United States to the Supreme Court, except by writ of error, and under this Act final judgments or decrees are removed from the District Court for the District of Alaska, to the Supreme Court, *as in other cases.*

It is the purpose and intention of the Act that the District Court for the District of Alaska is a District Court of the United States, for a certain unorganized region, and not peculiarly a Territorial Court in the sense of the term "Territorial Court" as applied to the organized Territories.

We are aware that this Court has held that the District Court for the District of Alaska is the Supreme Court in said District. Our contention is not inconsistent at all with said holding. Admitting that it is the highest Court, or the Court of final resort in said Alaska, it does not follow that it is a Territorial Court of the

same nature, governed by the same rules, as the Territorial Courts of the organized Territories. It is a creature entirely of the Act of Congress. Its jurisdiction may be altered from time to time only by Act of Congress, whereas, a Territorial Court proper is subject to alteration as to its jurisdiction, etc., from time to time by the Territorial Legislature.

Again, the same Act in section 8 declares that the District of Alaska is *created* a land District, so that Alaska would bear about the same relation to a Territory as a School District will to a County. It is more a quasi organization than anything else, with a Court established with jurisdiction co-extensive with a land district *created.*

Sec. 9 provides that there shall be no Legislative Assembly in the said District, nor shall any delegate be sent to Congress therefrom.

Again, in Section 13, the Secretary of the Interior shall make all needful provision for education of the children in Alaska, and section 14 of the Act specially recognizes and continues in force "Title XXIII, Chapter 3, of the Revised Statutes of the United States, relating to the unorganized Territory of Alaska;" showing conclusively it to have been the intention of Congress that Alaska, with this *quasi provincial form of government* is not to be considered as one of the Territories, but still as an unorganized Territory, without the powers of an organized Territory.

Therefore, we contend that the Act of April 7, 1874, is applicable only to the Territorial Courts of the Territories of the United States as then organized, and that it did not cover and apply to, nor gather within its provisions, the Court created by the Act of 1884 for the District of Alaska; that this Court in Alaska is peculiar in its nature, and is a Court *sui generis* for maintaining order in a district not having a republican form, but a provincial form, of government.

Further, and as touching this point, the plaintiff in error respectfully suggests to this Court, that since the organization of this District Court, for the District of Alaska, the practice has been universal that removals from said District Court to the Appellate Court were governed by the same rules and regulations as in cases of removal from the Circuit and District Courts of the United States, viz., by writ of error in common-law actions, and by appeal in other cases; that plaintiff in error procured his *writ of error* in the utmost good faith, in pursuance of the universal practice theretofore obtaining, and reliance that such long, unbroken and continued course was proper in the premises; and in view of this fact, and of the further fact that the proposition of the learned counsel for defendants in error must cetrainly not be free from doubt, we submit that this appeal ought not to be dismissed, because of the first ground urged by the defendants in error.

And as further evidencing the understanding or inter-

pretation of Congress itself of this in the same sense, we respectfully refer to Section 202, of Title II, Chapter 21, p. 62, of the recent Act of Congress, prescribing a criminal code of Alaska, which section provides that "appeals and writs of error in criminal actions may be taken and prosecuted from the decisions and judgments of the District Court of the District of Alaska to the Supreme Court of the United States, or to the Circuit Court of Appeals for the Ninth Circuit, in the same manner and under the same regulations as from the Circuit and District Courts of the United States under the Acts of Congress now in force or that may be hereafter enacted." We further suggest that Congress in this Act does not refer to Alaska as the Territory of Alaska, but simply provides for the punishment of crime in the "District of Alaska," and title the Court "District Court of the District [not Territory] of Alaska."

II.

The second ground for dismissal of the writ argued by the learned counsel for defendants in error is that this Act of July 8, 1898, is a retroactive law, and that it is unconstitutional and void because of

"1st. Its interference with the powers of the judiciary; and

2nd. It impairs vested rights."

We do not know the date of its passage.

If the fact of the defendant in error's having procured

execution and sale of property thereunder carries any weight upon this proposition, it seems to us it is overbalanced by the further fact that before his sale the bill which finally became a law was introduced and pending in Congress. Any action of his was subject to the power of Congress to legislate concerning the matter.

The Act provides that appeals pending in the Circuit Court of Appeals of San Francisco from Alaska prior to the 30th of December, 1897, of which the Supreme Court of the United States would have had jurisdiction under the then existing law, be, and the same are deemed and treated as regularly filed on appeal in the Supreme Court of the United States, as of date when filed in the Circuit Court of Appeals.

This appeal was pending on the 30th of December, 1897.

Here was an act of the plaintiff in error toward appealing his case. By mistake or inadvertence and believing that the *Coquitlam* case authorized it, his papers were deposited in the wrong office. Congress by this Act sought to give effect to the act or appeal of the plaintiff in error, and all other appellants from the Alaska Court, by providing that the appeals so taken should be considered as taken to this Court. It seems to us that Congress had power to make such a provision.

The able counsel in his argument insists that this Act could not be operative after the right of appeal had been

forfeited and lost. What is there before this Court to show that the right of appeal from the Court of Alaska to this Court direct was forfeited? The time within which an appeal may be had was the time prescribed by the laws of Oregon, in force in 1884. There is nothing in this record to show the Court that the time for an appeal direct to this Court had expired at the date of the passage of the Act in question.

But aside from this, we think the proposition of law asserted by counsel, viz., that Congress has not power to pass a retrospective statute, is not the law.

The Constitution of the United States, in Article I., Sec. 9, fixes certain limitations to the powers of Congress, among which is not the limitation of its power to pass a retrospective statute.

It will be conceded that Congress has power to make "all needful rules and regulations respecting the territory belonging to the United States."

There is no sovereignty in Alaska. The acts of Congress are not only the Supreme laws, but are the only laws of Alaska.

We concede that the highest Courts of many of the States have held that the State legislatures have not the power to pass retroactive laws which impair the obligation of contracts, but we contend that even states are not prohibited from passing laws retroactive in operation, and not impairing the obligation of contracts, or partak-

ing of the nature of *ex post facto* laws, "no matter how seriously it may affect vested interests, or how obnoxious it may be to every principle of sound and wholesome legislation."

Black on Const. Prohibitions, Sec. 171, where is also laid down the rule that any limitation upon the power of the several states in this respect must be sought for in the Constitution of the particular State, as is the case in the Constitution of Texas, from which some of the cases cited by the learned counsel came.

But we contend that the Act of Congress in question is not prohibited by the United States Constitution.

This Act was in fact no more than an Act extending the time for appeal, or give effect to an attempted appeal which Congress certainly had power to pass.

Congress having the power to provide in the first place that an appeal should be made ot the Circuit Court of Appeals or to this Court, by filing papers with the Circuit Court of Appeals, it certainly has power to ratify what was done in good faith by the plaintiff in error in this respect, and we think that is practically all Congress has done.

One of the earliest cases decided by this Court is that of *Calder et wife, vs. Bull, et wife,* 3rd Dall., 386, in which Justice Chase renders, what appears to our minds to be, a lucid and clear discussion of the principle involved, from which we quote *in extenso:*

"The Legislature of Connecticut on the second Thursday of May, 1795, passed a resolution or law which, for the reasons assigned, set aside a *decree* of the *Court of Probate for Hartford* of the 21st of *March*, 1793, which decree *disapproved* of the will of Normand Morrison (the grandson) made the 21st of *August*, 1779, and refused to *record* the said will; and granted a new hearing *by the said Court of Probate*, with liberty of appeal therefrom in six months. A new hearing was had, in virtue of this resolution or law, before the *said Court of Probate*, who, on the 27th of *July*, 1795, *approved* the said will, and ordered it to be recorded. At August, 1795, appeal was then had to the Superior Court at Hartford, who at February term, 1796, *affirmed* the decree of the Court of Probate. Appeal was had to the Supreme Court of Errors of Connecticut, who in June, 1796, adjudged *that there were no errors*. More than eighteen months elapsed from the decree of the Court of Probate (on the 1st of March, 1793), and thereby Caleb Bull and wife were barred of all right of *appeal*, by statute of Connecticut. There was no law of that State whereby a *new* hearing, or trial, before the said Court of Probate might be obtained. *Calder and wife* claimed the premises in question, in right of his wife, as heiress of N. Morrison, physician; *Bull and wife* claim under the will of N. Morrison, the grandson. The counsel for plaintiffs in error contend that said resolution or law of the legislature of Connecticut, granting a *new hearing*, is an *ex post facto* law, prohibited by the Constitution of the United States." Continuing, the Court says: "The *effect* of the resolution or law of Connecticut above stated, is to *revise* a decision of one of its Inferior Courts, and to direct a *new* hearing of the case by the *same Court of Probate* that passed a decree *against* the will of Normand Morrison. By the *existing* law of Connecticut a *right to recover certain property* had vested in *Calder and wife* (the appellants) in consequence of a decision of a *Court of Justice*, but, in virtue of a subsequent resolution or law *and the new hearing thereof*, and the decision in consequence, this right to recover certain property

was divested, and the right to the property declared to be in Bull and wife, the appellees."

The learned Justice then, after discussing the restrictions laid by the Constitution of the United States upon the States, says:

"All the restrictions contained in the Constitution of the United States on the power of the State Legislatures, were provided in favor of the authority of the Federal Government."

And further in speaking on the nature of *ex post facto* laws, and to the effect that they are applicable to criminal laws merely, the learned Justice says:

"I do not think it was inserted to secure the citizen in his *private rights*, of either *property, or contracts.*" * * * "In my opinion the true distinction is between *ex post facto laws* and *retrospective laws.* Every *ex post facto* law must necessarily be *retrospective;* but every *retrospective* law is not an *expost facto* law; the former only are prohibited. Every law that takes away, or impairs, *rights vested,* agreeably to *existing laws,* is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no *retrospect;* but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement. They are certainly *retrospective,* and literally both *concerning, and after, the facts committed.* * * * Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations, is *retrospective.* But such laws may be proper or necessary, as the case may be. * * * In the present case, there is no fact done by *Bull* and wife, plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut. It does not *concern,* or *relate* to, any act done by them. The decree of the *Court of Probate of Hartford* (on the 21st, March)

in consequence of which *Calder* and wife claim a right to the property in question, was given *before* the said new law or resolution and in that sense was affected and set aside by it; and in consequence of the law allowing a hearing and the decision in favor of the will, they have lost, what they would have been entitled to, if the law or resolution, and the decision in consequence thereof, had not been made. The *decree of the Court of Probate* is the only *fact,* on which the law or resolution operates. In my judgment the case of the plaintiffs in error, is not within the *letter* of the prohibition; and for the reasons assigned, I am clearly of the opinion, that it is not within the *intention* of the prohibition. * * * It was further urged, that if the provision does not extend to prohibit the making *any law after a fact,* then *all choses in action;* all land by *Devise;* all personal property by bequest, or distribution; by *Elegit;* by execution; by judgments; will be unprotected from the legislative power of the States; *rights vested* may be divested at the will and pleasure of the state legislatures; and, therefore, that the true construction and meaning of the prohibition is, that the states pass *no law to deprive a citizen of any right vested in him by existing laws.* * * * The restraint against making any *ex post facto* laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a *vested right to property.*"

Mr. Justice Patterson delivers a separate opinion in the case just cited, in which he holds that the power of granting new trials was by previous law in Connecticut imparted to the Superior and County Courts, but that "does not remove or annihilate the pre-existing power of the Legislature in this particular; it only communicates to other authorities a concurrence of jurisdiction, as to the awarding of new trials."

Mr. Justice Iredell likewise renders a separate opinion, in which he uses the following language:

"The authority to declare an act void is of a delicate and awful nature, and the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion), had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid."

Therefore, this does not impair the obligation of any contract (even conceding for the sake of argument, that Congress has not power to pass a law impairing the obligation of a contract). It merely relates to or affects an act or a decision of the Circuit Court of Appeals, in like manner as the Act in the case above cited related to and affected the decision of the Probate Court.

Hence, we say that Congress, which has the power to establish inferior courts of justice for Alaska, and provide for the appointment of judges, and to make all

regulations for the administration of justice within Alaska, and which also has the power to alter or change this jurisdiction from time to time, certainly possesses the power to pass an Act, the effect of which is either to grant a new trial or to ratify or perfect a defective appeal.

"The distinction between the obligation of a contract, and the remedy given by the Legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the Nation shall direct."

Sturges vs. Crowninshield, 4 Wheat. 200;
Mason vs. Haile, 12 Wheat, 374;
Satterlee vs. Mattheson, 2 Peters, 380.

In this case Satterlee and Mattheson held land in Pennsylvania in common under a Connecticut title. A division having been made between them, Satterlee became tenant of Mattheson of his part of the land set off in severalty. Satterlee afterwards obtained a Pennsylvania title to the land leased to him by Mattheson, and Mattheson brought suit in ejectment. The lower Court held that Satterlee was estopped to set up title against his landlord, but the Supreme Court held "that the relation between landlord and tenant could not exist between persons holding under a Connecticut title;" and awarded the land to Satterlee. This decision was in 1825. In the following year the Pennsylvania Legislature enacted: "That the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut

settlers and Pennsylvania claimants as between other citizens of the commonwealth."

The suit was brought on again, and Mattheson, by virtue of this enactment, recovered the land. On appeal to this Court the Act was attacked as being repugnant to the Constitution of the United States, "because it impairs the obligation of the contract; because it creates a contract between parties where none previously existed by rendering that a binding contract which the law of the land had declared to be invalid; and because it operates to divest and destroy the vested rights of the plaintiff."

This Court censures the laws as "an unwise and unjust exercise of legislative power," but held, nevertheless, that it does not impair the obligation of a contract, and that

> "It is a retrospective act, but retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument. * * * The objection, however, which was most pressed upon the Court, and relied upon by counsel for plaintiff in error, was that the effect of the Act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this or of any Circuit Court, which has condemned such a law upon this ground; provided its effect is not to impair the obligation of a contract."

Wilkinson vs. Leland, 2 Peters, 627.

This was an action to recover real estate. Plaintiffs were heirs of one Jenckes, who at the time of his death

resided in New Hampshire, but left real estate in both New Hampshire and Rhode Island. The will was probated in New Hampshire. The executrix in 1790 obtained a license from the Probate Court of New Hampshire to sell real estate to pay debts. The will was never proved or administration taken out in Rhode Island. The executrix, in 1791, sold the premises in Rhode Island to the grantors of Wilkinson. In 1792, the Legislature of Rhode Island passed an Act ratifying and confirming the sale. Plaintiffs below devisees of Jencks attack this Act as unconstitutional, and recovered the land. Upon appeal this Court held:

"The sale made by the executrix [to defendant's grantors] in virtue of such license, was totally void; and the deed given thereupon was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. It was a mere nullity. * * * To all that has been said at the bar upon the danger, inconvenience and mischiefs of retrospective legislation in general, and of Acts of the character of the present in particular, this Court has listened with attention, and felt the full force of the reasoning. It is an exercise of power which is of so summary a nature, so fraught with inconvenience, so liable to disturb the security of titles, and to spring by surprise upon the innocent and unwary to their injury, and sometimes to their ruin, that a Legislature invested with the power can scarcely be too cautious or too abstemious in the exertion of it."

The Court then, after holding that the devisee of Jenckes took a vested estate in fee in the lands in Rhode Island, held that this act is not unconstitutional. Continuing further, the Court says:

"The only question then is, what is the intent of the Legislature in the Act of 1792? Is it merely to confirm a void act, so as to leave it void; that is, to confirm it in its infirmity? or is it to give general validity and efficacy to the thing done? We think there is no reasonable doubt of its real object and intent. It was to confirm the sale made by the executrix, so as to pass the title of her testator to the purchasers."

Hence we submit, under the authority of the above case, the Act of Congress in question here was to give general validity and efficacy to the thing done by Thorp, viz., to his *bona fide* act of appeal, which, under the decision of this Court in the *Coquitlam* case, he was fairly justified in believing should have been in the first instance to the Circuit Court of Appeals.

Watson, et al., vs Mercer, et ux., 8 Peters, 88.

The facts in this case are these: May 8, 1785, Mercer and wife, executed a deed to the premises (then being the separate property of the wife) to a trustee, who on the same day reconveyed the property to Mercer, the object being to vest the estate in the husband. The certificate of acknowledgment of the deed to the trustee did not comply with the law then in force. In April, 1826, or forty-one years after the deed, the Pennsylvania Legislature passed an Act, the object of which was to cure all defective acknowledgments. Plaintiffs in ejectment claim title under the husband, and the defendants claim as heirs at law of the wife. The deed had been previously decreed void for defective acknowledgment, and plaintiffs in error, as heirs of wife, let into possession.

Ejectment was brought against them after the passage of the Act of 1826. Judgment was rendered for the plaintiffs below in 1832. Upon appeal this Court says:

"The argument for the plaintiffs in error is, first, that the Act violates the Constitution of the United States, because it divests their vested rights as heirs at law of the premises in question; and 2d, that it violates the obligation of the contract. * * * As to the first point, it is clear that this Court has no right to pronounce an Act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of he United States does not prohibit States from passing retrospective laws generally, but only *ex post facto* laws. In short, *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private right retrospectively."

Charles River Bridge vs. Warren Bridge, 11 Peters, 423.

See also *Bronson vs Kinzie, et al.,* 1 Howard, 331, 332, wherein this Court decided a question similar to the principle involved herein, and after reviewing the case of *Satterlee vs. Mattheson, supra,* say:

"Here was a direct legislation not only on existing rights growing out of contracts, but such an effect was given to the law as to divest vested rights. And yet this act was held not to be in violation of the Constitution of the United States. What vested right is there or can there be, in the nature of things, in the holder of a contract to the particular remedy for its enforcement which existed at its date? but if there were such a vested right as to the remedy, which there is not, it may, under the above

authority, be devested by law. If the decision do not mean this, it means nothing. * * * But the remedy for the enforcement of the contract being established by the law-making power, may be modified at its discretion. This is admitted as regards subsequent contracts, but the same rule applies to prior ones. So far as the mere remedy is concerned, in my judgment, no sound and practical distinction can be drawn between prior and future contracts."

See also

B. & S. R. R. Co. vs. Nesbit, 10 How., 395.

In this last case an Act of the Legislature of Maryland, incorporating the Railroad Company, provided for an inquisition to condemn land for corporate purposes, which condemnation should be confirmed by the Court. Inquisition was held December 13, 1836, upon the Nesbit land, and the order of confirmation by the Court entered April 24, 1837. The Act provided that upon the confirmation by the Court the Railroad Company might pay the appraised value and acquire the land. In 1841, and before the payment of the appraised valuation, the Legislature of Maryland passed a statute directing "That the Court should set aside the inquisition found and direct inquisition *denovo.*" Upon petition of the owners of the land the Court, April 26, 1844, entered a rule upon the Railroad Company to show cause, etc., and upon May 13, 1847, ordered that the inquisition be set aside, and that the Court would proceed to hear the application *denovo.* The Railroad Company replied, and one of the grounds urged was that the title to the land condemned

having vested by the confirmation of the inquisition, and tender of the money anterior to the judgment setting it aside, the Act of 1841 was unconstitutional "because it divested vested rights." This Court decided in favor of "the authority or practice of the State Legislature in awarding a new trial or in ordering a proceeding in the nature of an appeal after litigation actually commenced, or even after judgment. * * * That there exists a general power in the state government to enact retrospective and retroactive laws, is a point too well settled to admit of action at this day."

"That a statute is not void because it is retrospective, has been repeatedly held by this Court. * * * It is one of the contingencies to which parties look now in making a large class of contract, that they may be affected in many ways by State and National Legislation."

Curtiss vs. Whitney, 13 Wall., 68;
Lock vs. New Orleans, 4 Wall., 172.

The Courts are not at liberty to declare a statute void, because, in their opinion, it invades the fundamental principles of civil liberty, or violates the maxims of republican government, unless those principles are declared and guaranteed by the Constitution; nor because the Act is opposed to the spirit of the Constitution.

Cooley, Const. Lim., 164, *et seq.*

So in Tennessee, the Supreme Court held:

"It is not for the judiciary to inquire whether the Legislature has violated the genius of the government, or the

general principles of liberty and the rights of man, or whether their acts are wise and expedient or not; but only whether it has transcended the limits prescribed for it in the Constitution. By these alone is the power of that body bounded; that is the touch-stone by which all its acts are to be tested."

Louisville, &c. R. R. vs. County Court, 1 Sneed, 687;

Sharples vs. Mayer, &c., 21 Penn. St., 147, 161;

Commonwealth vs. MacCulsky, 2 Rawle., 369, 374;

Bridgeport vs. Railroad, 15 Conn., 475, 497.

"Statutes, if they are only in aid of judicial proceedings, and tend to their support by precluding parties from taking advantage of errors which do not effect their substantial rights, cannot be obnoxious to the charge of usurping judicial power, etc."

Cooley, Const. Lim., 107.

The cases cited by the learned counsel in support of his proposition that this act was an interference with the powers of the judiciary, are somewhat ancient, the latest one being *13 Minn.* That citation is not applicable. In that case, it appears that the time for appeal had expired, and the appellant *had made no effort* to perfect an appeal within the time, and it acocrdingly held that the act of the Legislature in so far as it gave him a right to

appeal after the expiration of such a right, was unconstitutional. That case, however, differs from the case at bar, in two particulars, first, there is nothing in this record from which it can appear that the time for the appeal of the appellant herein had expired at the passage of the law in question; second, assuming, however, that the time had expired, it is not denied that appellant did do an *act looking toward perfecting his appeal* within the time. Now all the statute has done in this case was to give efficacy to that act, which, by reason of some informality had not yet perfected the appeal. But we find in Minnesota a case in point, being *Converse vs. Burrows, 2 Minn., 229*, which case has been approved by the Supreme Court of Minnesota in *2 Minn., 201; 4 Minn., 375; 4 Minn., 430; 6 Minn., 386; 12 Minn., 486.*

See also, on same proposition,

Prout vs. Berry, 2 Gill., 147;

State vs. Northern Cen. R. R., 18 Md., 193.

We submit, if this *2 Minn.* case had not been the law applicable to the state of facts in that case it would have been expressly overruled in the *13 Minn.* We take it that the Court in rendering its decision in *13 Minn.* recognized the distinction between the cases.

Now, if it is competent for the Legislature to cure or perfect a defective deed or acknowledgment of a citizen, it is likewise competent for it to cure or perfect an imperfect or irregular appeal.

III

We further submit, as an additional reason for denying the motion to dismiss, that defendants in error by their general appearance, have waived their right to urge the grounds now raised for dismissal of this appeal.

Upon the foregoing we submit that the motion to dismiss should be denied and this case be heard finally upon its merits.

Respectfully submitted,

J. T. RONALD,

Attorney for Plaintiff in Error.

EXHIBIT "A."

COPY OF RECORD AS TAKEN FROM BILL OF EXCEPTIONS.

"And afterwards, to-wit, on the 3rd day of December, 1895, the following further proceedings were had and appear of record in said cause, to-wit:

S. A. BONNIFIELD, ET AL.,
vs.
WILLIS THORP. } No. 439.

ORDER OVERRULING DEMURRER.

Come now the parties hereto, by their respective attorneys and defendant's demurrer to plaintiffs' complaint coming on to be heard and the Court being sufficiently advised in the premises, overrules said demurrer, to which ruling of the Court the counsel for the defendant excepts, and defendantis given until Monday, December 23, 1895, to file his answer to said complaint.

And afterwards, to-wit, on the 26th day of December, 1895, the plaintiffs filed a Motion for Judgment, which is in words and figures following, to-wit:

In the United States District Court, for the District of Alaska.

S. A. BONNIFIELD AND JOHN G. HEID, *Plaintiffs,* vs. WILLIS THORP, *Defendant.*	No. 439.

MOTION FOR JUDGMENT.

Come now the plaintiffs in the above-entitled action, by Johnson & Heid, their attorneys, and move the Court for judgment for want of answer, for the reason that it appears from the record in this action that the defendant had been duly served with summons and has failed to answer the complaint of plaintiffs herein, and that the time for answering the said complaint has expired.

JOHNSON & HEID,
Attorneys for Plaintiffs.

And afterwards, to-wit, on said 26th day of December, 1895, the following further proceedings were had and appear of record in said cause, to-wit:

S. A. BONNIFIELD AND JOHN G. HEID,
vs.
WILLIS THORP. } No. 439.

ORDER FOR ENTRY OF DEFAULT.

The defendants having been duly served with the summons and complaint and having failed to answer the complaint, and the time for answering the complaint having expired and no answer having been filed with the Clerk of the Court within the time allowed by the Court,

Now, on motion of plaintiffs' attorneys, in open court, the default of the defendant is hereby entered.

And afterwards, to-wit, on the said 25th day of January, 1896, the following further procedings were had, and appear of record in said cause, which are in words and figures following, to-wit:

S. A. BONNIFIELD AND JOHN G. HEID,
Plaintiffs,
vs.
WILLIS THORP,
Defendant. } No. 439.

ORDER FOR JUDGMENT.

In this cause defendant's motion to open default, granted herein on December 26, 1895, having been sub-

mitted without argument by stipulation of parties, and the Court now being fully advised in the premises, denies said motion, and directs that judgment be entered for plaintiffs in accordance with the written opinion on file herein."

[redacted]

[redacted]

[redacted]

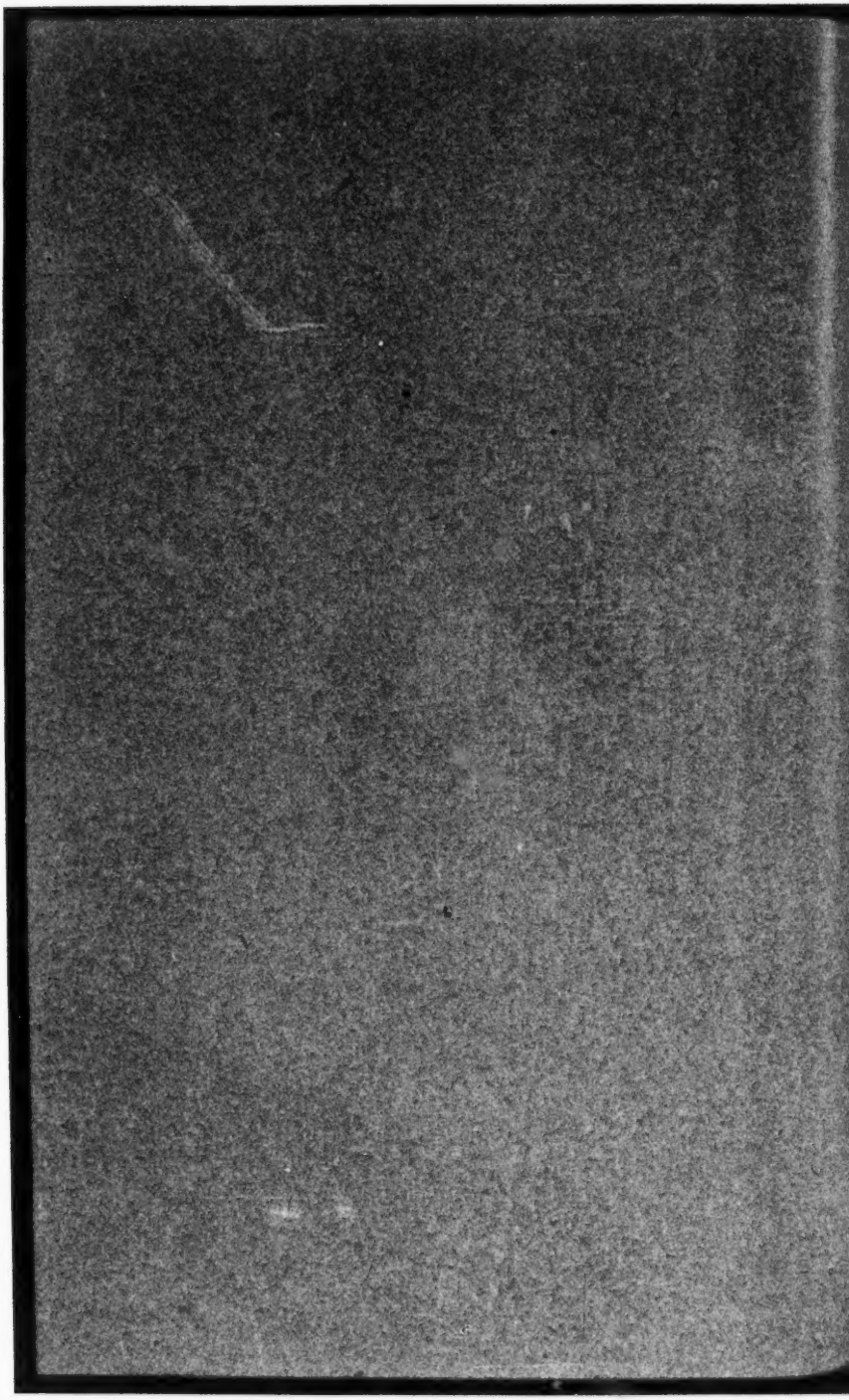
[redacted]

WRIT OF ERROR TO THE DISTRICT COURT OF ALASKA

Brief of Plaintiff in Error

J. T. RONALD
Attorney for Plaintiff in Error

[redacted]



IN THE

Supreme Court of the United States

WILLIS THORP,
Plaintiff in Error,

vs. NO.....

S. A. BONNIFIELD and JOHN G. HEID,
Defendants in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF ALASKA

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

On June 25, 1894, the defendants in error, S. A. Bonnifield and John G. Heid, held a lease of a certain mining claim known as the "Aurora Lode Mining

Claim," in Alaska, with the right to work and mine the same and to extract ore therefrom until April 24, 1896. Robert Duncan, Jr., and J. Parker Corbus had a mortgage upon the claim for a sum aggregating, principal and interest, nearly $4,000.00.

These mortgagees caused a writ of injunction to issue prohibiting the lessees from removing ore from the mine.

Being unable to pay off the mortgage, or to operate the mine until payment of the mortgage should be provided for, they made certain arrangements with plaintiff in error, Willis Thorp, whereby said Thorp procured a release of the writ and received from defendants in error a transfer or assignment of the lease, with all the privileges and rights of defendants in error therein, for a term ending Dec. 31, 1894.

See Record, pp. 1 to 12.

The parties disagree as to the terms upon which Thorp was to operate the mine.

The defendants in error allege the agreement as to terms to be in writing.

See Exhibit D., Record, pp. 12-15.

This is not signed by Thorp; and the contract is de-

nied by Thorp in his answer tendered (Record, p. 73) to be hereafter referred to.

This action is brought by defendants in error against plaintiff in error to recover damages for alleged breach of contract by Thorp.

The obligation assumed and the breach wrought by Thorp, according to the contention of defendants in error, is set forth in the complaint as follows:

"The said Thorp did agree to pay said mortgage, * * * and to assume and pay all and every claim standing against or on account of said premises contracted by said Bonnifield and Runkle, at the date thereof.

That the said defendant, Thorp, further agreed to mine, work and operate said premises and after making all the payments in said lease mentioned, to-wit, the amount of said mortgage and debts contracted on account of said premises, was to retain for himself seven-sixteenths (7-16) parts of the profits or net proceeds arising from the operation of said mine and premises and to pay to these plaintiffs, S. A. Bonnifield and John G. Heid, the remaining nine-sixteenths (9-16) parts of the profits or net proceeds arising from said operation of said mine and premises in the proportion of 7-16 to Bonnifield and 2-16 to Heid.

That under and in accordance with said agreement and assignment of said lease the said Willis Thorp entered into possession of said premises and worked, mined and operated the same up to and until the 31st day of December, 1894, extracting and taking out therefrom, gold, of the value and amount of $32,000.00, and ore and concentrates, to the amount and value of $3,500.00, of which he disposed and sold the same.

That the cost and expense of working, mining, operating and extracting said gold and ore from said premises was $23,000.00, leaving a balance of profits or net proceeds of $12,500.00, of which the said Bonnifield and Heid were entitled to 9-16 part thereof.

That under said assignment and as a part of the expenses incurred in connection with said premises was the sum of $200, advanced and paid by the said Bonnifield and not repaid him from the earnings of said mine.

That the said defendant, Thorp, has failed and refused to pay said sums, or any part thereof, although often demanded."

See Record, pp. 3-5.

Thorp appeared in due time by his Attorneys Messrs. Bostwick & Crews, and moved for "an order requiring plaintiffs to make their complaint more definite and certain."

See Record, pp. 17-19.

This motion was granted, and defendants in error required to insert in their complaint the amount of the mortgage which they alleged Thorp assumed.

See Record, pp. 20-22.

Thereafter, in due time on May 23, 1895, Thorp's Attorneys interposed a general demurrer to the complaint.

See Record, pp. 22-23.

On December 3, 1895, this demurrer was overruled, and plaintiff in error allowed an exception and given until "Monday, Dec. 23, 1895, to file his answer."

On December 26, 1895, defendants in error, without notice to or service upon the attorneys of plaintiff in error, filed a motion for judgment for want of answer, and on the same day, without notice to or the knowledge of plaintiff in error, procured the entry of an order of default against plaintiff in error.

See Record, pp. 24-25.

That the parties and their attorneys all resided at Juneau, 180 miles distant from Sitka, where the motion was filed, and the default ordered, and connected with Juneau by a bi-monthly steamer only.

On Dec. 28, Attorneys for plaintiff in error moved to vacate and set aside said order of default (See Record, pp. 41-43), supporting the same by affidavit of mer-

its; (See Record, pp. 30-39) and at the same time served notice of calling up said motion on the 8th day of January thereafter, on the arrival of the first steamer at Sitka. See Record, pp. 39-41.

Counter affidavits were filed on behalf of defendants in error.

See Record, pp. 45-50.

The motion was duly presented, and on Jan. 25 the Court denied the motion to vacate and directed judgment for plaintiffs (defendants in error), and on the same day, without further notice, or the hearing or examination of any testimony whatever, judgment was entered against plaintiff in error in accordance with the prayer of the complaint.

See Record, pp. 68-69.

Four days later, to-wit, Jan. 29, plaintiff in error moved for an order vacating and setting aside this latter judgment, and for permission to file a verified answer, then and there tendered, (See Record, pp. 72-79) and promptly gave notice of calling the same up at the arrival of the next steamer in Sitka, about Feb. 9th. (See Record, p. 70.)

This application was supported by affidavits.

See Record, pp. 79-96.

Feb. 8th the Court entered the following:

"Order denying Motion to Vacate Judgment.

"In this cause, defendant's motion for an order setting aside the judgment granted herein on January 25, 1896, coming on regularly to be heard, plaintiff and defendant each being represented by counsel, and after hearing argument of counsel, and the Court being fully advised in the premises, denies said motion, but if there is a mistake in the computation as to the amount of judgment it may be corrected in that regard; and plaintiffs are given until the arrival of the next steamer, "City of Topeka," on or about February 25th, 1896, to file affidavit to show no error exists in said judgment, to which ruling of the Court the defendant at the time excepts."

See Record, p. 96.

No other or further order or ruling is ever made by the Court.

To the several rulings of the Court overruling the demurrer to the complaint, denying the motion for vacation of default, and ordering judgment against defendant in error *pro confesso;* denying the motion to vacate the judgment thus rendered and permit filing of answer, the defendant duly excepted, (See Record, pp. 132-142) and by writ of error brings the case to this Court (See Record, pp. 108-111) and assigns the following:

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

The Court erred in over-ruling defendant's general demurrer to plaintiff's complaint.

II.

The Court erred in over-ruling defendant's default for want of an answer, for the reason that the plaintiffs never notified the defendant, or his counsel, by notice or otherwise, that they intended to apply for said default.

III.

The Court erred in refusing to set aside the default granted as aforesaid, upon the application and showing made by the defendant Willis Thorp.

IV.

The Court erred in granting judgment on said default:

First—For the reason that no proof was offered in support of the allegations in plaintiff's complaint.

Second—That there was no application or motion for judgment on said default filed by the plaintiffs and that the defendant had no notice of the intention of the plaintiffs to apply for, or the Court granting said judgment, and there was no application, in writing, by motion, or otherwise, asking for judgment on said default.

V.

The Court erred for the same reasons in entering judgment in this cause in favor of the plaintiffs, which said judgment was entered on the 25th day of January, 1896.

VI.

The Court erred in refusing to allow defendant's motion to vacate and set aside the said judgment on the showing made in support of said motion, as shown by the files, records and proceedings in said cause.

ARGUMENT AND AUTHORITIES.

We discuss these specifications in the following order:

I.

Error in overruling the demurrer to the complaint.

We think a brief analysis of this complaint will sustain this assignment.

This is an action to recover damages for failure to pay over profits.

Thorp is not compelled to pay over any profits until he receives profits for plaintiffs.

Now when are plaintiffs entitled to profits? What must be paid or done by Thorp, before dividends can be declared?

He must pay three items:

1st. Expense of operation, etc.

2nd. Duncan-Corbus mortgage.

3rd. "All and every other claim standing against or on account of the property."

Now, the complaint admits plaintiffs are to have a

percentage of such sum *only* as shall remain after these three items are discharged.

This complaint shows that after the discharge of the first item, viz., expense of operation, there remained $12,500.

They claim their 9-16 of this sum. But this is not the contract pleaded.

Before they can have their dividend there must be paid out of this balance the other two items.

The complaint shows the 2nd item, the mortgage, to amount to $3,686.59.

This deducted from the above leaves a smaller ballance of $8,813.

Before profits can be distributed there must be paid out of this balance the 3rd item, viz., "all and every claim standing against or on account of the mine."

What these amount to does not appear from the complaint.

Herein is its defect.

It must show that the amount of this 3rd item, which is the aggregate of these "other outstanding claims," and show that when this item is deducted, there is a balance to be divided as profits.

Admitting the allegations of the complaint, as the demurrer does, it fails to show any surplus in Thorp's hands.

For aught that appears from the complaint, these "other outstanding" claims equaled or exceeded this last balance, in either of which events Thorp would have no surplus or profits to divide.

Hence we think the complaint fails to state sufficient facts to show the existence of any funds out of which plaintiffs are entitled to a percentage.

"A complaint to recover damages for breach of contract where the obligation of defendant depends on a contingency other than an act to be done by plaintiff, must allege the happening of such contingency."

Wilson vs. Clark, 20 Minn., 367;
Hinds vs. Henry, 36 N. J. L., 328;
DeWein vs. Osborn, 12 Colo., 407;
Mynicks vs. Merritt, 22 Fla., 335;
vs. Caldwell, 8 Allen, 309;
Murdock vs. Caldwell, 8 Allen, 309;
Cushman vs. Haynes, 20 Pick, 132.

II.

Error in granting default without notice to plaintiff in error.

We are of the opinion that where a party has appeared generally in a cause, filed and argued a motion, and later filed and argued a demurrer, procured the release of an attachment by executing and filing a satisfactory bond, as was done in this case, such party is entitled to notice of all subsequent proceedings.

This, we think, is the general rule in nearly all, if not all, of the Code States.

The law applicable in Alaska is section 530, Volume I, Hill's Code of Oregon, (2nd Edition). It reads as follows:

"A defendant appears in action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance, and until he does so appear he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the undertakings allowed to the defendant in the provisional remedies of arrest, attachment, and the delivery of personal property. When the defendant has not appeared, notice of a motion or other proceeding need not be served upon him, unless he be imprisoned for want of bail, or unless directed by the Court, or judge thereof, in pursuance of this code."

In this application the defendants in error gave no notice of their intention to move for default, but on the

contrary concealed that fact from the attorneys for plaintiff in error, and misled them.

See affidavit, p. 30 of the Record.

Hence we claim that the order of default was irregular.

III.

Error in refusal to set aside the default upon the application and showing made by Thorp.

In Horton vs. New Pass Gold & Silver Mining Co., 27 Pac., 376, the facts show that defendant's attorney demurred to the complaint which demurrer being overruled Apr. 16, obtained time to answer. The attorney negligently forgot when the time for answer would expire.

Default was entered May 2. On May 21, motion was made to set aside default.

A heavy judgment, to-wit, $5,000, was thus obtained against defendant without a trial, upon claims for which, according to the affidavit of merits, it was not responsible. The Court say:

"While opening a default is said to be much in the discretion of the lower court, the cases show that this means a legal discretion, which has been unhesitatingly

supervised by appellate tribunals wherever it appears to have been so exercised as to result in injustice. The discretion intended is not a capricious or arbitrary discretion, but an impartial discretion guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *exgratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. * * * It is safe to say that Courts should be liberal in such matters, where a meritorious defence is shown to the whole or a substantial part of an action, and it is apparent that the failure to answer is the result of a mistake or of negligence which is not so gross as to be inexcusable, or to indicate trifling with the Court; to the end that cases may be determined upon their merits, and not upon some inadvertence, or slip or aberration, of the opposing party or counsel, such terms can always be imposed as will compensate the plaintiff for any loss occasioned by the delay, and as will make it unprofitable to a defendant to wilfully neglect to answer. Courts are established not only to arbitrate and settle the legal controversies of men, but also to settle them, so far as the inherent imperfections of human tribunals will permit, upon a just and equitable basis. This can only be arrived at after a full and patient hearing of both sides. Of course there must

be rules of procedure for doing this, which must not be trifled with. Still they are but means to an end, and whenever they have so operated, or have been so administered, that the action has been determined with reference to them instead of the great principles of right and justice, it cannot be denied that therein the tribunal has failed to reach the end for which it was created. * * * If there is a refusal to set aside a default, a ruinous judgment may be sustained against a party who, upon hearing, might have interposed a perfectly good defense. By sustaining the default he would forever be debarred the right of a hearing. If then a *nisi prius* Court refuse to set aside a default when a party shows with reasonable certainty that he has a good defense, and he has only been guilty of carelessness and inattention to his business, but no willful or fraudulent delay, it would be highly proper even for an appellate Court to come to his relief, if the lower Court refused it."

And in the case cited, the Court, after finding that the default resulted from carelessness and negligence of defendant's attorney, and that the statute provides for the relieving of a party from a default when his negligence is excusable, further say: (p. 378) "It sufficiently appears from the affidavit that the defendant intended, in good faith, to contest its liability in the case. * * * Bearing in mind that the statute provides for

relieving a party from default taken against him through his negligence when the negligence is excusable, does it not appear at once that a judgment for over $5,000 is a rather heavy penalty to pay for such carelessness as is shown here? While it was negligence such as is properly punished by the infliction of terms, it does not seem to be of the kind that should be deemed inexcusable, and the defendant, consequently, denied any opportunity of making a defense. It was the severest penalty that could be invoked for the grossest misconduct."

Now, it is absolutely manifest from the record in the case at bar that the plaintiff in error intended to contest this claim upon its merits. He employed attorneys to represent him; they moved to make complaint more definite and certain, which motion being granted, they then demurred. Upon argument and overruling of demurrer they obtained twenty days to answer, which time expired Dec. 23rd. Mr. Crews, the member of the firm having especial charge of the case, had left Alaska, informing Mr. Bostwick, the member having no knowledge of the case, that they had sixty days to answer.

See Record, p. 93.

Mr. Bostwick knew nothing different until the morning of Dec. 23rd, the last day. He thereupon immediately sought the attorneys for plaintiff, with a view to obtaining an extension of time. Plaintiff in error be-

ing absent from Alaska, attending a Court in the State of Washington, and Bostwick having no knowledge at the time of the case, or of the defense, was unable to prepare an answer; besides this fact negotiations were then in progress with Bonnifield, the owner of seven-eights (7-8) of the claim, for settlement.

See Record, p. 87.

The Judge resided at Sitka, 200 miles away, between which place and Juneau a communication was had only semi-monthly. The next term of Court would not be held under the rule prior to March 31st following. Not finding attorneys for defendants in error on said 23rd, Bostwick saw Mr. Johnson, one of said attorneys, on the morning of the 24th, then going toward the wharf from which the steamer was about starting for Sitka, and upon asking Mr. Johnson for time, was referred by Mr. Johnson to his colleague, Mr. Heid, who refused on the ground that "Thorp was not entitled to any favor from them."

See Record, pp. 32, 33.

Neither Mr. Johnson nor Mr. Heid notified Mr. Bostwick that he (Johnson) was then en route for the steamer for Sitka to ask for default, although Bostwick asked Johnson where he was going. Had they so informed Mr. Bostwick of this fact, instead of concealing their intentions from him, said Bostwick could have

taken the same steamer for Sitka, and had he done so said default would not have been granted, as evidenced by the statement of the learned Judge, who in his written opinion states that had Bostwick shown the same diligence as Johnson, the order would not have been entered.

See Record, p. 66.

But Bostwick, knowing that attorneys for defendants in error knew full well the intention of plaintiff in error to answer and contest, and that trial could not be had until the next term of Court, and not having been served with any notice as he supposed himself entitled to, before such application, and having met and talked with Mr. Johnson while going to the boat, and later with Mr. Heid, neither of which left an intimation of their purpose, (See Record, p. 34) Bostwick certainly had reasonable grounds for believing that no such move was contemplated. If they had intimated their purpose, he could have have had yet time to proceed in the same boat to Sitka, and there would have secured a further extention, as intimated by the Judge in his opinion (p. 66 of the Record).

But the boat had gone and the order of default entered before Bostwick knew anything of plaintiff's intent. Immediately plaintiff in error, through his attorney, Bostwick, did everything possible to open up the

default, and later to vacate the judgment. The affidavit of merits discloses a perfect defense. Plaintiff in error being unexpectedly absent in Washington attending Court, and Crews, the only one of the attorneys knowing anything of his defense, being necessarily absent, Bostwick knowing nothing concerning the facts, discovers and sets forth an old verified account of Thorp as to the receipts and operation of the mine (See Ex. B., pp. 35-38 of Record).

From this account, which was the substance of the defense to be interposed, it appears that the balance remaining of the receipts after deducting the operating expenses of the mine was only $4,536.09. That this was inadequate to pay the Duncan-Corbus mortgage and "other debts and claims," which are therein set forth, and which were paid, however, by Thorp, leaving a balance of $2,216.00 due Thorp from plaintiffs.

We think the actions and conduct of attorneys for defendants in error, especially their failure to give notice, and evading Bostwick's question as to where Johnson was going, was, under all the circumstances of Thorp and Crews being unavoidably absent, and Bostwick's understanding of the extension being sixty days, and his lack of knowledge of facts, not only a surprise, but was a fraud upon him, and the showing of Thorp upon mo-

tion to vacate order of default was a showing not only of surprise, inadvertence and excusable neglect, but likewise the evidence of an absolutely perfect defense.

And upon the authority of the foregoing case of *Horton* vs. *New Pass Gold & Silver Mining Co.* we think the discretion of the Court as exercised in this case did not subserve, but did impede and defeat the ends of justice; that the negligence here was not so gross as to indicate trifling with the Court, that this cause was not determined upon its merits, but upon a slip or aberration of opposing counsel; that a ruinous judgment has been obtained against a party who upon hearing might have interposed a perfectly good defense; that a terrible penalty has been imposed upon plaintiff in error in this cause for negligence that is not entirely or altogether inexcusable. And see

Roland vs. Kryenhagen, 18 Cal., 457;
Watson vs. R. R. Co., 41 Cal., 20;
Howe vs. Coldren, 4 Nev., 171.

Default resulting from an omission, mistake, or forgetfulness on the part of the defendant, if the same was not wilful, is such inadvertence as to authorize the setting aside of the default.

Johnson vs. Eldred, 13 Wis., 483;
Whereat vs Ellis, 70 Wis., 212; (35 N. W., 314;)

Ordway vs. Suehard, 31 Ia., 481;
Jean vs. Hennessy, 37 N. W., 771;
Dougherty vs. Nevada Bank, 68 Cal., 275;
Henneman vs. LeClair, 51 N. W., 1101;
Baxter vs. Chute, 52 N. W., 379;
Lathrop vs. O'Brien, 50 N. W., 530;
Powell vs. Weith, 68 N. C., 342;
Mason vs. McNamara, 57 Ill., 274;
Brown vs. P. W. & B. R. R., 9 Fed., 183.

Defaults incurred through the ill advice or negligence of counsel are to be relieved against as well as any others.

Whereat vs. Ellis, 35 N. W., 318; (70 Wis., 212).
Hanson vs. Michelson, 19 Wis., 498.

The actions of attorneys for defendants in error on the morning following the 23rd of December, in concealing from Bostwick their intention and purpose [illegible] to Sitka, and afterwards going and defaulting him, of itself constitutes surprise.

Bast vs. Hyson, 6 Wash., 172.

In North Carolina the failure of an attorney to enter a plea, when employed to do so, was held to entitle his client to relief on the ground of surprise.

Griel vs. Vernon, 65 N. C., 76;

Meacham vs. Dudley, 6 Wend., 514;
See 1 Black on Judgments, 337.

Some of the States hold that negligence of the attorney is sufficient ground for setting aside the judgment, if the client was not in fault.

Nash vs. Whetmore, 33 Barb., 159;
Curtis vs. Ballags, 4 Edw. Ch., 639;
Phillips vs. Hawley, 6 Johns., 129;
Tripp vs. Vincent, 8 Paige, 180;
Millspaugh vs. McBride, 34 Am. Dec., 360;
Thompson vs. Goulding, 5 Allen, 82.
Bradford vs. Coet, 77 N. C., 72;
Griel vs. Vernon, 65 N. C., 76;
Hanson vs. Michelson, 19 Wis., 498;
Babcock vs. Perry, 4 Wis., 31;
Sharp vs. Mayor, etc., 31 Barb., 578;
Allen vs. Hoffman, 12 Ill., App. 573;
Ordway vs. Suchard, 31 Ia., 481;
Black on Judgments, Sec. 341.

IV. & V.

Error in granting and entering judgment on default without proof and without notice or application.

In addition to what has been urged under assignment III we think the authority of the Court to enter

judgment for plaintiffs after default is governed by Subd. 2, Sec. 249, Vol. 1, Hill's Annotated Laws of Oregon, (Second Edition) which is as follows:

"Judgment may be had upon failure to answer, as follows:

When the time for answering the complaint has expired, and it appears that the defendant, or one or more of several defendants, in the cases mentioned in section 60, has been duly served with the summons and has failed to answer the complaint, the plaintiff shall be entitled to have judgment against such defendant or defendants. * * *

2. In other actions, including all actions sounding in damages or tort, as opposed to an action for debt, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the clerk shall, upon the written motion of the plaintiff being filed, enter the default of the defendant, and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint; and in all such cases where judgment is rendered otherwise than on a verdict in favor of the plaintiff, the court without the intervention of the jury shall assess the damages which he shall

recover. The court may hear the proof itself, or make an order of reference to hear and report the testimony. The defendant shall not be precluded, by reason of his default, from offering proof in mitigation of damages. In making such assessment of damages, the court shall appoint a time therefor upon notice to the parties to the action. The party aggrieved by the assessment of damages shall have the right to appeal therefrom;"

It certainly must appear that a correct judgment for the sum due could only be arrived at by a process of calculation; that is by ascertaining the amount of the "other divers and sundry claims" against the property, which Thorp was required to pay before any dividend could be declared.

The damages were not for a fixed or liquidated sum which the clerk could enter up, but for a sum to be arrived at after deducting certain claims, the amount of which are not shown in the complaint, and can only be ascertained by evidence.

This is the very kind of a case provided for by Subd. 2 above quoted; but this is not the course followed by the learned Judge in this particular case.

The effect of a default is that the defendant is deemed to have *admitted* all that is *well pleaded* in the complaint. Where the amount of damages is not such

a fixed sum as can be entered by the Clerk without any further investigation or evidence, the default is not a final but a merely interlocutory order, and the default does not admit the amount of damages. This amount the plaintiff is required to prove, and the defendant, while not permitted to controvert any of the material and traversable averments of the complaint, is permitted to controvert the amount of damages. Thus a default in *assumpsit* where account is filed in an admission of indebtedness, but not of the amount; so an action for services rendered or the like is not upon a liquidated demand such that final judgment may be entered for the amount claimed upon failure to answer. Neither can a final judgment be rendered in an action of detinue. It is to meet just such cases that the subdivision quoted above from the Oregon Statute is intended.

Black on Judgments, Sections 28, 89, 91;
Sheldon vs. Sheldon, 37 Vt., 152;
Wolf vs. Hamburg, 8 S. C., 82;
Rogers vs. Moore, 86 N. C., 85;
Studdert vs. Hossell, 6 Humph., 137;
Williams vs. Rockwell, 64 N. C., 325;
Patrick vs. Ridgway, 4 Har. & J., 312;
Willson vs. Willson, 25 N. H., 229;
Maud vs. Loeb, 6 Sou. Rep., 376;
Russ vs. Gilbert, 19 Fla., 54;

Durden vs. Carhart, 41 Ga., 76;
Lambert vs. Sandford, 12 Atl., 519.

It is error to enter judgment on an insufficient complaint.

Black on Judgments, Sec. 84;
Amason vs. Nash, 19 Ala., 104;
Merritt vs. White, 37 Miss., 438;
Glenn vs. Shelbourne, 29 Tex., 125;
Abbe vs. Marr, 14 Cal., 210;
Barron vs. Frink, 30 Cal., 486;
Hallock vs. Jandin, 34 Cal., 167;
Bosch vs. Kassing, 20 N. W. Rep., 454;
See 64 Ia., 312;

The Court may, in its discretion and in furtherance of justice, set aside the judgment for other grounds just and reasonable, good at common law, outside the grounds mentioned in the statute.

Black on Judgments, Secs. 321-334;
Ladd vs. Stevenson, 19 N. E., 842;

The entry of the final judgment without proof was a *mistake* of the Court, and for such mistake it should be set aside.

Black on Judgments, Sec. 335.

VI.

Refusal of Court to vacate and set aside final judgment on the showing made.

What has been said under assignment III. is applicable here, with the additional statement that the order of the Court denying the motion (See Record, p. 96) recognizes the judgment is for too large a sum, and placed upon plaintiffs the burden of showing the judgment was not too large. No showing was ever made, nor was any further order of the Court had upon this subject.

With the showing made upon this motion is an answer of Thorp from which it appears that Thorp never made any written agreement as set forth in the complaint, but states the verbal agreement which was made, and from Thorp's answer it appears that the total receipts from the mines were less than the sum of the expenses, with the mortgage and other claims, and that instead of Thorp owing defendants in error, they are indebted to him nearly $3,000.00.

Therefore, we ask that the judgment of the lower Court be reversed, and the cause remanded with instructions that the same be dismissed.

Respectfully submitted,

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Attorney for Plaintiff in Error.